Muhammad Afandi bin Mukhtar v Public Prosecutor

HIGH COURT (KOTA BHARU) — CRIMINAL APPEAL NO MT 42S-3–1 OF 2017
AHMAD BACHE JC
25 APRIL 2018

Criminal Law — Appeal — Appeal against conviction and sentence — Appellant charged at sessions court for robbery with another accused under ss 34 and 394 of the Penal Code — Appellant convicted and sentenced to nine years imprisonment and two stroke of whippings — Whether conviction right and safe — Whether sentence imposed right and fair — Penal Code ss 34 & 394

The appellant was charged at the sessions court for committing robbery with another accused and in so doing had voluntarily caused hurt on the victim, an offence under s 394 read together with s 34 of the Penal Code. The appellant pleaded guilty of the offence after the charge was read and explained to the appellant. The appellant then was convicted and sentenced to nine years imprisonment from the date of arrest and two strokes of whipping. The appellant then filed the present appeal against the conviction and sentence.

Held, dismissing the appeal and affirming the decision of the sessions court's judge:

(1) Regarding the conviction, the court was satisfied that the learned judge had ensured that the appellant understood the charge after being explained by the interpreter. The learned judge had also ensured that the plea was unqualified and unequivocal. Based on the note of proceedings, the court was satisfied that there was no appealable error that merited appellate intervention. Thus, the conviction recorded was right and safe (see paras 13–14).

(2) The learned judge was right: (a) in deciding that public interest was of paramount importance and; and (b) when directing his mind that robbery was a serious offence and hence a long custodial sentence was necessary because the perpetrator was a threat to society. The traumatic effect left on the victim, the circumstances surrounding the crime, the mode and the injuries caused were factors which should weigh heavily in favour of a heavy and severe sentence to be imposed to the appellant. Further, the sentencing trend showed that the applicable sentence was between ten to 12 years imprisonment. Therefore, the court found that any appellate intervention was unwarranted and held that the learned

judge was right in the circumstances of the case in sentencing the accused to only nine years imprisonment with two whippings (see paras 16–17, 21 & 23–24).

[Bahasa Malaysia summary

Perayu telah didakwa di mahkamah sesyen atas kesalahan melakukan rpmpakan bersama-sama seorang tetuduh lain dan pada masa sama telah menyebabkan kecederaan secara sukarela kepada mangsa, satu kesalahan jenayah di bawah s 394 dibaca bersama s 34 Kanun Keseksaan. Perayu telah mengaku bersalah selepas tuduhan dibacakan dan diterangkan. Perayu kemudiannya telah dikenakan sabitan dan dijatuhkan hukuman penjara sembilan tahun dari tarikh perayu ditangkap dan dua kali sebatan. Perayu kemudiannya memfailkan rayuan semasa terhadap sabitan dan hukuman yang dikenakan.

Diputuskan, menolak rayuan dan mengekalkan keputusan hakim mahkamah sesyen:

(1) Berkenaan dengan sabitan yang dikenakan, mahkamah berpuas hati bahawa hakim terpelajar telahpun memastikan tertuduh memahami pertuduhan yang dikenakan selepas tuduhan tersebut diterangkan pada tertuduh. Hakim terpelajar juga telah memastikan pengakuan salah pengakuan salah yang dibuat tertuduh adalah satu pengakuan tidak bersyarat dan tidak mempunyai keraguan. Berdasarkan nota perbicaraan, mahkamah berpuas hati bahawa tiada apa-apa kesalahan yang membolehkan rayuan berkenaan sabitan dibenarkan. Oleh itu, mahkamah mendapati sabitan yang direkodkan adalah betul dan selamat (lihat perenggan 13–14).

(2) Hakim terpelajar membuat keputusan yang betul dalam: (a) mengambil kira faktor kepentingan awam; dan (b) mengambil kira kesalahan merompak adalah satu kesalahan jenayah yang serius dan memberikan hukuman penjara kepada pelaku rompakan adalah tepat kerana pesalah dalam rompakan adalah berbahaya kepada masyarakat. Kesan trauma pada mangsa, keadaan-keadaan semasa berlakunya rompakan dan tahap kecederaan yang dialami mangsa adalah antara faktor yang dititikberatkan mahkamah dalam mengenakan hukuman yang berat kepada tertuduh. Tambahan pula, berdasarkan trend rekod hukuman yang dikenakan, hukuman penjara antara sepuluh kepada 12 tahun dikenakan atas kesalahan merompak. Justeru, adalah tidak wajar bagi mahkamah untuk mengenepikan dan membatalkan hukuman yang telah diberikan okeh hakim mahkamah sesyen yang menjatuhkan hukuman sembilan tahun penjara dan dua kali sebatan ke atas tertuduh (lihat perenggan 16–17, 21 & 23–24).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

Cases referred to

Adam bin Atan v PP [2008] MLJU 402; [2009] 1 CLJ 33, CA (refd)
Dookee v Director of Public Prosecutions [2010] SCJ 71 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)
PP v Lee Tak Keong [1989] 1 MLJ 307; [1988] 1 LNS 217, HC (refd)
PP v Ling Leh Hoe [2015] MLJU 1006; [2015] 4 CLJ 869, CA (refd)
PP v Margarita B Cruz [1988] 1 MLJ 539 (refd)
PP v Muhari bin Mohd Jani & Anor [1996] 3 MLJ 116, HC (refd)
Sim Gek Yong v PP [1995] 1 SLR 537, HC (refd)

Legislation referred to

Criminal Procedure Code s 305
Penal Code ss 34, 394

Mohd Ridzuan bin Muhammad (Mohd Fadzli & Co) for the appellant.
Hajarul Falenna Itah bt Abu Bakar Adli (Deputy Public Prosecutor, Kelantan State Legal Advisor's Ofifice) for the respondent.

Ahmad Bache JC:

BACKGROUND

[1] The appellant/accused was charged at the sessions court for committing robbery with another accused and in so doing had voluntarily caused hurt on the victim, an offence under s 394 read together with s 34 of the Penal Code.

[2] The appellant/accused was not represented at the court below. However with the full guidance of the session's judge, the charge was read and explained by the court interpreter to him. The appellant/accused understood and pleaded guilty. After being satisfied that the appellant/accused understood the nature and consequences of his plea of guilty, and after being satisfied that the plea given was unequivocal and unqualified, and that the facts of the case to which the accused admitted had revealed that the appellant/accused committed the offence, the session's judge convicted him and sentenced him to nine years imprisonment from the date of his arrest (21 December 2016) and two strokes of whipping.

[3] Dissatisfied, the appellant/accused filed an appeal on conviction and sentence in this court. In mid stream learned counsel proceeded the appeal on sentence only. After hearing submissions by both parties, this court dismissed

A the appeal and affirmed the decision of the trial judge.

[4] Dissatisfied with the decision, the accused/appellant filed an appeal to the Court of Appeal through the Jabatan Penjara on both conviction and sentence. These are the grounds for the decision of this court.

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THE CHARGE

[5] The charge against the accused/appellant was as follows:

C Bahawa kamu bersama-sama pada 07 December 2016 jam lebih kurang 7.00 pagi di sebuah rumah tanpa nombor Kg. Lubok Nibong, Pak Badol, Bachok, di dalam Daerah Bachok, di dalam Negeri Kelantan, telah melakukan rompakan dan dengan sengaja menyebabkan cedera kepada penama *MUHAMAD SHAFIQ BIN CHE MAT, KP: 001020-03-0923.* Oleh yang demikian kamu telah melakukan satu kesalahan dan boleh dihukum di bawah Seksyen 394 Kanun Keseksaan dan dibaca D bersama Seksyen 34 kanun yang sama.

THE FACTS OF THE CASE

E **[6]** The brief facts of the case as appreciated by the trial judge are reproduced below in verbatim:

i. Pada 7 December 2016 sekitar jam 7.00 pagi pengadu bersama 3 orang adiknya sedang tidur di rumah kakak Pengadu di Kg. Lubuk Nibong telah mendengar ketukan pintu rumah.

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ii. Pengadu terdengar suara dari luar, '*kami polis*' dan OKT 1 terus menendang pintu rumah sehingga terbuka.

iii. Dua orang lelaki masuk ke dalam rumah dan salah seorang daripada lelaki tersebut pengadu kenali sebagai Affendy bin Mokhtar iaitu OKT 1.

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iv. OKT 1 meluru ke arah pengadu yang sedang berbaring di ruang tamu dan memijak perut pengadu dan menendang pengadu.

v. OKT 1 mengacukan sebilah pedang panjang dan berkata '*MU DOK DIAM AKU NAK SEMBELIH AYAH DAN ABANG MU*'.

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vi. OKT 1 menyucuh api rokok ke dada pengadu sambil mengugut pengadu untuk mendiamkan diri.

vii. OKT 1 mengeledah rumah tersebut dan mengambil dua buah speaker, 1 tab Samsung, 1 telefon Nokia, 2 utas gelang emas dan duit RM15.00 dari poket pengadu.

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viii. Kemudian, OKT 1 dan OKT 2 melarikan diri dengan menaiki motorsikal.

THE LAW ON APPEAL AGAINST CONVICTION UPON PLEADING GUILTY

[7] Eventhough the appellant/accused was barred from appealing against conviction as his counsel did not pursue it earlier, for record purposes this court had prepared the grounds.

[8] The law on appeal against conviction upon pleading guilty is trite, that an accused cannot file any appeal on it. This is by virtue of s 305 of the Criminal Procedure Code which reads:

> When an accused person has pleaded guilty and been convicted by a Magistrate on the plea, there shall be no appeal except as to the extent or legality of the sentence.

[9] However there are circumstances which can nullify an accused's guilty plea giving rise to the conviction recorded being set aside on appeal. A common example of such situation will be that the charge was not fully understood by the accused because of language problem and no interpreter service was accorded to him. Hence the accused did not understand the nature and consequences of his plea, rendering his plea unqualified and unequivocal (see *Public Prosecutor v Margarita B Cruz* [1988] 1 MLJ 539).

THE LAW ON APPEAL AGAINST SENTENCE

[10] The law on appeal against sentence is manifest that the appellate court should be slow to interfere or disturb with the sentence passed by the court below unless it is manifestly wrong or unsuitable to the proved facts and circumstances of the case. In fact in the case of *Adam bin Atan v Public Prosecutor* [2008] MLJU 402; [2009] 1 CLJ 33, the Court of Appeal said in an appeal against sentence, the initial function of the appeal court is one of review only. The mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the trial court applies the correct principles of sentencing.

[11] Although there is a plethora of authorities on this point, suffice for this court to apply the principles of sentencing as enunciated in the decision of the Court of Appeal in *Public Prosecutor v Ling Leh Hoe* [2015] MLJU 1006; [2015] 4 CLJ 869 vis:

> [14] The appellate court can and will interfere in the sentence imposed by the lower court if it is satisfied that any of the following four grounds are made out:
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> (a) the sentencing judge had made a wrong decision as to the proper factual basis for the sentence;

(b) there had been an error on the part of the trial judge in appreciating the material facts placed before him;

(c) the sentence was wrong in principle; or

(d) the sentence imposed was manifestly excessive or inadequate (see (d) *R v Ball* (1951) 35 Cr App Rep 164; *Loo Weng Fatt v Public Prosecutor* [2001] 3 SLR 313 at para 65; *Public Prosecutor v UI* [2008] 4 SLR 500.

[12] To generalise it, whilst an appellate court should be slow in interfering the sentence imposed by the trial court in the exercise of their discretion as sentencing is not a science of mathematical application, an appellate court can interfere on the sentence if it is wrong in principle or the sentence imposed is manifestly excessive or manifestly inadequate. In fact the court of Criminal Appeal in *Dookee v Director of Public Prosecutions* [2010] SCJ 71 said:

> However, even if there is nothing wrong with the principle, the sentence may be increased by the appellate court if it is unduly lenient.

ANALYSIS AND FINDINGS OF THIS COURT

Regarding conviction

[13] Regarding conviction, this court was satisfied that the learned judge had ensured that the appellant/accused understood the charge after being explained by the interpreter. The learned judge had also ensured that the plea was unqualified and unequivocal. This was what he said in his grounds of judgment at p 11 of the appeal record:

> [3] Pertuduhan telah dibacakan dan telah diterangkan kepada OKT 1, OKT 1 mengaku salah serta faham sifat dan akibat pengakuan salah pertuduhan tersebut.
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> [4] Mahkamah ini melalui jurubahasa telah menerangkan kepada OKT 1 akan sebab akibat dari pengakuan iaitu boleh dikenakan hukuman yang boleh sampai sehingga 20 tahun dan boleh dikenakan denda atau sebat.
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> [5] OKT 1 mengangguk faham akan penerangan tersebut.

[14] This court had looked at the notes of proceedings as well. This court was satisfied that there was no appealable error that merits appellate intervention. The conviction recorded was right and safe.

Regarding sentence

[15] This court shares the view that robbery is a very serious offence regardless whether it is armed or unarmed, with or without causing hurt. It is more serious when injuries were inflicted on the victim.

[16] The learned session's judge in complying with the principles of

sentencing was right in deciding that public interest is of paramount importance. It should supersede the interest of the appellant/accused. The learned judge was right when he translated into reality that view when he sentenced the appellant/accused to nine years imprisonment, with two whippings.

[17] The learned judge was right when he rightly directed his mind that robbery, especially when dangerous weapon was used and injuries caused in the course of committing the offence, is a serious offence, and hence a long custodial sentence is necessary because the perpetrator is a threat to society. Hence public interest warrants that the offence of robbery be dealt with seriously. This was what the learned judge said in his grounds of judgment at p 18 of the appeal record:

> [22] Tindakan ganas OKT 1 dan seksaan yang telah diperlihatkan OKT 1 mewajarkan saya mengenakan sebatan serta mengenakan hukuman pemenjaraan yang panjang kepada OKT 1.
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> [23] Untuk itu, pemakaian saya kepada kata-kata Kamardin Hashim H dalam kes *Herman v Pendakwa Raya* [2011] MLJU 193; [2011] 5 CLJ 896 sebagai:
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> > Memandangkan masyarakat sentiasa diancam oleh perompak- perompak serta kejadian rompakan yang sering berlaku di negara kita, sudah sampai masanya perubahan dilakukan dengan menaikkan tempoh hukuman pemenjaraan dan sebatan terhadap pesalah-pesalah yang disabitkan atas kesalahan merompak. Perlu ada pendekatan baru dalam menghukum pesalah bagi kesalahan rompakan semoga dengan itu akan dapat membendung gejala rompakan yang tidak menunjukkan trend yang menurun dengan matlamat utamanya bagi melindungi masyarakat umum.

[18] It follows that public interest warrants that the sentence imposed must reflect the gravity and seriousness of the offence and that it acts as a deterrent to the appellant/accused and also to would be offender. One way is for courts to pass a severe sentence to strike fear in the minds of those who harbour thoughts of committing the offence. In fact public interest demands a deterrent sentence to be imposed so much so that even the effect of a guilty plea as in this case must give way (*Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537) or be considered with less significant weight. The deterrent factors must weigh strongly in the minds of the sentencing court. Above all, it should reflect public abhorrence to this type of crime and also protection to the public at large.

[19] Towards this end, this court found that the learned judge had correctly directed his mind on those proposition and that the law was framed with a view to protect the public from being a victim of heartless perpetrators who live on others like the appellant/accused. This rationale is manifested in the section itself (s 394 of the Penal Code), which provides for a maximum sentence of 20 years imprisonment and also liable to be whipped. Further, a strong message

should be sent to the public at large that just like rape, the court view this offence with much detestation and a severe punishment should be imposed.

[20] The learned judge has also considered the circumstances surrounding this case where violence and threat was used and injuries caused. This was what he said at p 17 of the appeal record:

> [17] Faktor yang lain yang menentukan hukuman kepada OKT 1 ialah keganasan atau seksaan yang dilakukan oleh OKT 1 kepada mangsa.
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> [18] Dalam kes ini, fakta yang saya temui ialah OKT 1 telah mengacukan pedang panjang kepada mangsa dan mengugut mangsa dengan perkataan 'Mu Dok Diam Aku Nak Sembelih Ayah Dan Abang Mu'.
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> [19] Seterusnya, OKT 1 bukan sahaja telah memijak perut pengadu dan menendang pengadu malah telah mencederakan pengadu dengan menyucuh api rokok ke dada pengadu.
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> [20] Pada pendapat saya, tindakan tersebut adalah satu bentuk seksaan yang kejam.

[21] Hence this court too had taken into account the above circumstances and the mode of committing the crime which was cruel and crude, where deadly weapon was used to instill fear and caused injuries on the helpless victim. The traumatic effect left on the victim, the circumstances surrounding the crime, the mode and weapon used and the injuries caused are factors which should weigh heavily in favour of a heavy and severe sentence to be imposed on the appellant/accused. Hence the nine years imprisonment imposed by the learned judge was right and fair.

[22] Towards this end, this court would like to refer to the observation made by Zakaria Yatim J in the case of *Public Prosecutor v Lee Tak Keong* [1989] 1 MLJ 307; [1988] 1 LNS 217, a case of gang robbery but without the use of a weapon where His Lordship said:

> The offence of robbery is rampant today and in most cases dangerous weapons are used. In some cases the victims of the robberies sustain injuries: see *Goh Chong Wee v Public Prosecutor* 52–60 of 1987 (unreported) and *Public Prosecutor v Mustanina bin Daing Sinring & Anor* 51–125 of 1987 (unreported). In cases of robbery the court must take into consideration the element of public interest. This means that the court must impose a deterrent sentence not only to deter the respondent from committing the same offence again but to deter others from committing the same type of crime. The court is aware that in the present case no dangerous weapons were used and the complainant and his friend were not injured. But the court must not overlook the fact that there were five of them who surrounded the complainant and his friend and committed the robbery. If the court does not impose a deterrent sentence the respondent and his four other friends may commit similar offences and they may even use dangerous weapons and inflict injuries on their victims.

[23] This court had also taken into consideration the sentencing trend for this type of offence. As the maximum sentence is 20 years the sentencing trend seems to show the applicable sentence to be between ten to 12 years imprisonment, depending on the circumstances of the case.

[24] Even using the principle in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167; *Public Prosecutor v Muhari bin Mohd Jani & Anor* [1996] 3 MLJ 116 where a discount of 1/4 or 1/3 of the sentence that would otherwise have been imposed had it gone on full trial, the sentence would be in the region of ten to 14 years. Hence by sentencing the accused to only nine years imprisonment with two whippings this court found that the learned judge was right in the circumstances of the case. Hence any appellate intervention was unwarranted.

CONCLUSION

[25] In the upshot this court found that the decision of the learned judge was right. No appellate intervention was warranted. The appeal against conviction and sentence was accordingly dismissed and the decision of the session's judge affirmed.

Appeal dismissed and decision of session court's judge affirmed.

Reported by Mohd Kamarul Anwar